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Volume 53 | Number 2 Article 7

2019

Sinking the Island of Constitutional Tax Immunity: A Uniform Approach to State Taxes on Goods in Transit Under the Import-Export Clause

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Smith, Warren F. (2019) "Sinking the Island of Constitutional Tax Immunity: A Uniform Approach to State Taxes on Goods in Transit Under the Import-Export Clause," *Georgia Law Review*: Vol. 53: No. 2, Article 7.
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SINKING THE ISLAND OF CONSTITUTIONAL TAX IMMUNITY: A UNIFORM APPROACH TO STATE TAXES ON GOODS IN TRANSIT UNDER THE IMPORT-EXPORT CLAUSE

Warren Furman Smith[*]

The Framers of the U.S. Constitution adopted the Import-Export Clause to prohibit the states from interfering in international relations, to preserve import revenue for the federal government, and to ensure harmony between the states. The purposive inquiry established by Michelin *and* Washington Stevedoring *is applied for all imports and exports except one category: export goods in transit. The pre-*Michelin *decision,* Richfield Oil*, provides complete constitutional tax immunity for export goods in transit. This island of constitutional tax immunity forces local taxpayers to subsidize exporters and foreign consumers and unfairly burdens coastal states with the regulatory, administrative, and environmental costs of shipping exports with no means to tax the beneficiaries of these services. This Note urges the Supreme Court to overturn* Richfield Oil *and apply the* Michelin *approach uniformly to import and export goods, in accordance with the text and purpose of the Import-Export Clause.*

[*] University of Georgia School of Law, J.D. Candidate 2019; University of Georgia B.B.S., Accounting, 2016. I would like to thank my parents, Craig and Lola Smith, for their endless support, as well as Kim Nguyen, my constant proofreader. I also thank my beloved friends from the Demosthenian Literary Society of the University of Georgia for teaching me to cultivate a correct mode of argument and always listening to me rant about tax policy.

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I. INTRODUCTION

When the United States Supreme Court's Import-Export Clause jurisprudence veered in a new direction in *Michelin Tire Corp. v. Wages*,[1] the issue of whether to apply this new analysis to export goods in transit fell by the wayside. The *Michelin* Court no longer assumed that the Import-Export Clause provided absolute tax immunity to all imports and exports but instead developed an analysis based on the history and intent of the Import-Export Clause itself.[2] However, the *Michelin* Court qualified its holding by noting that the property tax in question applied to goods "no longer in transit" rather than to goods that were in transit.[3] The Court did not address whether the *Michelin* approach applied to goods in transit,[4] leaving lower courts to wrestle with how *Richfield Oil Corp. v. State Board of Equalization*,[5] the pre-*Michelin* decision on export goods in transit, applies in the wake of the *Michelin* reasoning and resulting in a non-uniform application of the Import-Export Clause.[6]

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[1] *See* 423 U.S. 276, 279 (1976) (overruling Low v. Austin, 13 Wall. 29 (1872)); *see also* Walter Hellerstein, Michelin Tire Corp. v. Wages*: Enhanced State Power to Tax Imports*, 1976 SUP. CT. REV. 99, 99 (1976) ("In *Michelin Tire Corp. v. Wages*, the Supreme Court abandoned a century of [Import-Export Clause] precedent . . . .").

[2] *See* Dep't of Revenue v. Ass'n of Wash. Stevedoring Cos., 435 U.S. 734, 751 (1978) (noting that the *Michelin* Court "surveyed the history and purposes of the Import-Export Clause to determine, for the first time, which taxes fell within the absolute ban on 'Imposts or Duties'").

[3] 423 U.S. at 302. The "in transit" distinction stems from the pre-*Michelin* "export stream" doctrine. *See infra* note 30.

[4] *See Ass'n of Wash. Stevedoring Cos.*, 435 U.S. at 758 n.23 (deferring the "question of the applicability of the *Michelin* approach when a State directly taxes imports or exports in transit").

[5] 329 U.S. 69 (1946).

[6] The four-decades-old disagreement in lower courts lingers even today. *Compare* Dulles Duty Free, LLC v. Cty. of Loudoun, 803 S.E.2d 54, 61 (Va. 2017), *cert. denied*, 138 S. Ct. 1440 (Mem) (Apr. 2, 2018) (applying *Richfield Oil* to invalidate a local gross receipts tax on sales to passengers on international flights because "the issue whether the *Michelin* test would apply to a non-discriminatory tax that falls on . . . goods in transit" had not yet been decided by the Supreme Court), *with* P.J. Lumber Co. v. Cty. of Prichard, 249 So. 3d 1135, 1139 (Ala. Civ. App. 2017) (applying the *Michelin* approach to uphold a tax based on the gross receipts of export goods because *Richfield Oil* is "no longer valid").

The Import-Export Clause was adopted to prohibit seaboard states from exploiting their inland neighbors,[7] but the lingering exception to the *Michelin* approach has contorted it into a means of subsidizing exporters at the expense of local taxpayers. *Richfield Oil* provides a "bright-line immunity for goods in the stream of export" even when exporters benefit from local police, fire protection, and other government services.[8] The expansion of this sphere of absolute tax immunity is welcomed by exporters.[9] *Richfield Oil* subverts the Import-Export Clause's purpose because the Framers of the Constitution "did not expect residents of the ports to subsidize commerce headed inland."[10] *Richfield Oil*'s grant of tax immunity for export goods in transit has become what Justice Black feared at the time: "an island of constitutional tax immunity."[11] This Note will discuss how the application of the *Michelin* approach to export goods in transit is more consistent with the Import-Export Clause.

Part II of this Note will examine the origin and purpose of the Import-Export Clause and how *Michelin* began an important shift in Import-Export Clause jurisprudence by applying a policy-based approach more compatible with the text and original intent of the Import-Export Clause. Part II will explain how *Michelin*'s reservation for "in transit" goods has resulted in inconsistent application of the Import-Export Clause to export goods in transit.

Part III of this Note will argue that the Supreme Court should overturn *Richfield Oil* and apply the *Michelin* approach to both import and export goods. Because *Michelin* adopted a test that

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[7] *See* Boris I. Bittker & Brannon P. Denning, *The Import-Export Clause*, 68 MISS. L.J. 521, 522 (1998) (noting the origin of the Import-Export Clause as a remedy for "commercial strife").

[8] Virginia Indonesia Co. v. Harris Cty. Appraisal Dist., 910 S.W.2d 905, 911 (Tex. 1995).

[9] *See* Carrie Salls, *Duty free stores at Dulles Airport win at VA. SC; Decision significant for Import-Export Clause*, LEGAL NEWSLINE (Sept. 6, 2017), https://legalnewsline.com/stories/511204498-duty-free-stores-at-dulles-airport-win-at-va-sc-decision-significant-for-import-export-clause (quoting Dulles Duty Free's attorney praising the court's decision as "perhaps the most significant Import-Export Clause decision issued in the last 20 years" that will "affect the entire U.S. duty-free industry"). *But see* Daniel Hemel, *The Tax Battle Brewing (Just) Outside the Capitol*, MEDIUM, (Dec. 22, 2017), https://medium.com/whatever-source-derived/the-tax-battle-brewing-just-outside-the-capitol-410760db3830 (arguing that "[w]hatever your view of constitutional interpretation, the [export stream] doctrine offers little to love").

[10] Dep't of Revenue v. Ass'n of Wash. Stevedoring Cos., 435 U.S. 734, 753–54 (1978).

[11] Richfield Oil Corp. v. State Bd. of Equalization, 329 U.S. 69, 87 (1946) (Black, J., dissenting).

analyzes whether a tax is consistent with the policies of the Import-Export Clause, the potential exception under *Richfield Oil* implies that a tax may be prohibited by the Constitution despite being fully consistent with the Constitution's underlying policies. This Note will conclude that the *Michelin* approach should be applied uniformly to imports and exports in analyzing the constitutionality of state taxes under the Import-Export Clause.

II. BACKGROUND

The Import-Export Clause was included in the U.S. Constitution to achieve three primary purposes: first, to allow the Federal Government to conduct foreign policy without interference from the states; second, to reserve imports as an exclusive source of federal revenue; and third, to promote interstate harmony.[12] In 1976, the Supreme Court established an approach to evaluating duties in *Michelin* that ensured only those exactions that impinge the purposes of the Import-Export Clause would be constitutionally prohibited.[13] However, *Richfield Oil* has never been overturned and stands as a possible exception to the *Michelin* approach.[14]

A. THE IMPORT-EXPORT CLAUSE

The *Michelin* revolution had its basis in the origin of the Import-Export Clause itself. As the *Michelin* Court noted, "a compelling reason for the calling of the Constitutional Convention of 1787 was the fact that the Articles essentially left the individual States free to burden commerce among themselves and with foreign countries very much as they pleased."[15] For example, New York City instituted a tariff on goods from Connecticut and New Jersey to

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[12] *See* Youngstown Sheet & Tube Co. v. Bowers, 358 U.S. 534, 555–58 (1959) (listing these three purposes as forces that led to the inclusion of the Import-Export Clause).

[13] *See* Bittker & Denning, *supra* note 7, at 530 (noting that the Court adopted a new approach to the Import-Export Clause in *Michelin*).

[14] *See* United States v. Int'l Bus. Machs. Corp., 517 U.S. 843, 862 (1996) (suggesting in dicta that the core holding in *Richfield Oil* has not been overruled).

[15] Michelin Tire Corp. v. Wages, 423 U.S. 276, 283 (1976); *see also* Cook v. Pennsylvania, 97 U.S. 566, 574 (1878) ("A careful reader of the history of the times which immediately preceded the assembling of the convention that framed the American Constitution cannot fail to discover that the need of some equitable and just regulation of commerce was among the most influential causes which led to its meeting.").

prevent commerce from "carr[ying] thousands of dollars out of the city and into the pockets of detested Yankees and despised Jerseymen."[16] Because of this tariff and other tariffs protecting Pennsylvania, James Madison described New Jersey's commerce as a "[c]ask tapped at both ends."[17] The New Jersey legislature retaliated,[18] and one New Jersey newspaper decried this abuse as "a tribute to those states which even Great Britain would have disdained to exact."[19] These discriminatory tariffs, permitted by the Articles of Confederation, worked to undermine the unity of the fledgling nation, which called for a solution.

To prevent this commercial warfare between the states, the Framers proposed a solution: the Import-Export Clause. [20] This sparked a heated debate,[21] producing a rather detailed and comprehensive Import-Export Clause:

> No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's [sic] inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.[22]

While the Import-Export Clause was adopted primarily to put an end to the economic rivalries of the states, the Framers had other purposes for the constitutional provision. The Import-Export Clause

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[16] JOHN FISKE, THE CRITICAL PERIOD OF AMERICAN HISTORY 146 (1888).

[17] James Madison, *Preface to Debates in the Convention of 1787*, *in* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 539, 542 (Max Farrand ed., rev. ed. 1966).

[18] *See* FISKE, *supra* note 16, at 147 (reporting that New Jersey placed a $1,800 tax on a New York municipal lighthouse located in New Jersey's jurisdiction).

[19] WILLIAM C. HUNTER, THE COMMERCIAL POLICY OF NEW JERSEY UNDER THE CONFEDERATION, 32 (1922).

[20] *See* Bittker & Denning, *supra* note 7, at 521–22 (arguing that while the "Import-Export Clause has long been overshadowed by the Commerce Clause," the Import-Export Clause was the "principal remedy proposed by the Philadelphia Convention to remedy the commercial strife").

[21] *See id*. at 523 (arguing that the detailed state of the Import-Export Clause reflected the "spirited debated that aired a diversity of rival proposals for ending the perceived commercial evils").

[22] U.S. CONST. art. I, § 10, cl. 2.

was intended to reserve import duties as a primary source of revenue for the Federal Government.[23] Without reserving the exclusive power to the Federal Government to levy duties on imports and exports, the United States could not speak with one voice when regulating commercial relations.[24]

The Supreme Court had recognized these three underlying purposes of the Import-Export Clause before the *Michelin* court shifted Import-Export Clause jurisprudence. In *Youngstown Sheet & Tube Co. v. Bowers*, the Court listed the "forces which led to the inclusion of Art. I, s 10, cl. 2, the Import-Export Clause in the Constitution."[25] First in importance was ensuring the government's ability to "speak with one voice when regulating commercial intercourse," followed by "secur[ing] to the National Government an important source of revenue" and "prevent[ing] the seaboard States, possessed of important ports of entry, from levying taxes on goods flowing through their ports to inland States."[26] However, the Supreme Court in *Youngstown* did not apply these purposes directly to that case, instead making "essentially a determination of the physical status of the foreign goods."[27] This was typical of the Import-Export Clause approach prior to *Michelin*.

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[23] *See, e.g.*, Letter from North Carolina Delegates to Governor Caswell (Sept. 18, 1787), *in* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 83, 84 (Max Farrand ed., 1911) (expecting "a considerable Share of the National Taxes [to] be collected by Impost, Duties, and Excises"); *see also* THE FEDERALIST NO. 11 at 85 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (noting that "the greatest part of the national revenue is derived from taxes of the indirect kind, from imposts, and from excises").

[24] *See, e.g.*, CHARLES PINKNEY, OBSERVATIONS ON THE PLAN OF GOVERNMENT, *in* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 116 (Max Farrand ed., 1911) ("The intention [of the Import-Export Clause] is to invest the United States with the power of rendering our maritime regulations uniform and efficient, and to enable them to raise a revenue, for Federal purposes, uncontrolable by the States."); *see also* THE FEDERALIST NO. 11, *supra* note 23, at 91 (demanding that the United States "concur in erecting one great American system . . . and [be] able to dictate the terms of the connection between the old and new world!").

[25] 358 U.S. 534, 555 (1959).

[26] *Id*. at 556.

[27] *Id*. at 558. The *Youngstown* Court recognized the "original package" doctrine, while noting that "[b]reaking the original package in only one of the ways by which packaged goods that have been imported for use in manufacturing lose their distinctive character as imports." *Id*. at 548.

B. THE *MICHELIN* REVOLUTION

Before *Michelin*, determinations of the constitutionality of taxes on imports and exports rested on whether the physical good being taxed was an import or export.[28] In *Brown v. Maryland*, the court held that imports received state tax immunity so long as they remained in their "original package."[29] Building on that, *Low v. Austin* held that the Import-Export Clause prohibits states from imposing non-discriminatory property taxes on imports until they lose their character as imports by becoming "incorporated into the mass of property in the state."[30] Exports were immune to state taxation as soon as they entered the "export stream."[31] Goods enter the export stream when they begin their "final continuous journey out of the country."[32] As soon as the goods entered the export stream, under this earlier approach, they enjoyed absolutely tax immunity.[33] Both the "original package" doctrine and "export stream" rules fail to inquire whether the taxes imposed are the types of imposts or duties prohibited by the Import-Export Clause and instead focus on the nature of the goods being taxed. This mechanistic approach was much criticized.[34] *Michelin* changed this

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[28] *See* Dep't of Revenue v. Ass'n of Wash. Stevedoring Cos., 435 U.S. 734, 752 (1978) ("Previous cases had assumed that all taxes on imports and exports and on the importing and exporting processes were banned by the Clause.").

[29] 25 U.S. 419, 442 (1827) (applying the "original-package doctrine" to provide immunity to imports still "in the original form or package in which it was imported").

[30] See *Low v. Austin*, 13 Wall. 29, 33 (1872); *see also Michelin*, 423 U.S. at 282 (calling *Low* "the leading decision of this Court" for the proposition that goods lose their character as imports by being incorporated into the mass of property in the state).

[31] *See, e.g.*, Coe v. Errol, 116 U.S. 517, 525 (1886) (developing the export stream rule, which provided exports with tax immunity once sufficient commencement of the exportation process occurred); *see also* Richfield Oil Corp. v. State Bd. Of Equalization, 329 U.S. 69, 83 (1946) (striking down a tax as unconstitutional when oil was delivered into storage tanks of a New Zealand-bound steamer because it "marked the commencement of the movement of the oil abroad"). *But see* United States v. Int'l Bus. Machs. Corp., 517 U.S. 843, 871 (1996) (Kennedy, J., dissenting) (arguing that the export stream rule draws parties into "the factual morass of determining when exportation has begun").

[32] *See* Dep't of Revenue v. Ass'n of Washington Stevedoring Cos., 435 U.S. 735, 752 (1978).

[33] *See id.* (recognizing that under the "export stream" rule, "[a]s soon as the journey began, tax immunity attached").

[34] *See, e.g.*, Alexander R. Early & Robert G. Weitzman, *A Century of Dissent: The Immunity of Goods Imported for Resale from Nondiscriminatory State Personal Property Taxes*, 7 SW. U. L. REV. 247, 249 (1975) (arguing that the distinction between discriminatory and non-discriminatory states taxes "has not always been properly considered by courts" before *Michelin*).

inquiry entirely and adopted a new, policy-based approach to the Import-Export Clause.[35]

At issue in *Michelin* was a non-discriminatory Georgia ad valorem property tax on the taxpayer's inventory of imported tires.[36] These tires had been imported from the taxpayer's French factory and were being stored in its Gwinnett County warehouse until the tires would be delivered to the taxpayer's franchised dealers in nearby states.[37] This ad valorem property tax was non-discriminatory because it applied to all goods owned by Georgia taxpayers on the day of assessment, whether or not they had been imported.[38] By definition, a non-discriminatory tax does not discriminate against goods "because of their place of origin."[39] The Supreme Court of Georgia upheld the non-discriminatory ad valorem property tax under the original package doctrine.[40] On appeal to the United State Supreme Court, both sides focused their arguments around the application of the original package doctrine.[41] The *Michelin* Court, however, used this case as an opportunity to announce a "modern Import-Export Clause test."[42]

The *Michelin* Court overruled *Low* and repudiated the original package doctrine.[43] Instead, the Court applied a three-part test based on the three primary goals of the Import-Export Clause:

> The Framers of the Constitution thus sought to alleviate three main concerns by committing sole power to lay imposts and duties on imports in the Federal

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[35] *See* Bittker & Denning, *supra* note 7, at 530 (arguing that *Michelin* overthrew "almost a century and a half of case law and adopt[ed] a fundamentally new analysis of the Import-Export Clause").

[36] *See* Michelin Tire Corp. v. Wages, 423 U.S. 276, 276 (1976).

[37] *See id*. at 280 (finding that distribution of the tires was limited to the "franchised dealers with whom petitioner does all of its business in six southeastern States").

[38] *See* Bittker & Denning, *supra* note 7, at 530 (noting that the tax applied to all goods "whether imported or locally produced").

[39] *Michelin Tire Corp.*, 423 U.S. at 286.

[40] *See* Wages v. Michelin Tire Corp., 214 S.E.2d 349, 355 (Ga. 1975) (upholding the tax on unpackaged tire inventory because commingling the tires with other shipments caused the inventory to lose its status as imports).

[41] *See Michelin Tire Corp.*, 423 U.S. at 302 (White, J., concurring) (arguing that there was no reason to overrule *Low* because "[n]one of the parties has challenged that case here, and the issue of its overruling has not been briefed or argued").

[42] Itel Containers Int'l Corp. v. Huddleston, 507 U.S. 60, 76 (1993).

[43] *Michelin Tire Corp.*, 423 U.S. at 301 (overruling *Low v. Austin*).

> Government, with no concurrent state power: [1] the Federal Government must speak with one voice when regulating commercial relations with foreign governments . . . ; [2] import revenues were to be the major source of revenue of the Federal Government and should not be diverted to the States; [and 3] harmony among the States might be disturbed unless seaboard States . . . were prohibited from levying taxes on citizens of other States by taxing goods merely flowing through their ports . . . .[44]

Therefore, a state tax only impugns the Import-Export Clause if it interferes with one of these three objectives. In support of this policy-based approach, the *Michelin* Court quoted Chief Justice Marshall's cautionary remark in *Brown* that it "might be premature to state any rule as being universal in its application."[45] Therefore, the test had to be a somewhat functional approach.[46]

In applying this approach to the Georgia tax at issue in *Michelin*, the Court concluded that the non-discriminatory property tax did not offend the first purpose because it did "not fall on imports as such because of their place of origin," could not "be used to create special protective tariffs or particular preferences for certain domestic goods," could not "be applied . . .to encourage or discourage any importation in a manner inconsistent with federal regulation," and therefore could "have no impact whatsoever on the Federal Government's exclusive regulation of foreign commerce . . . ."[47] The tax also "deprive[d] the Federal Government of nothing [such as revenues from imposts and duties on imports and exports] to which it is entitled."[48] Nor did Georgia's tax violate the preservation of interstate harmony because such non-discriminatory taxation did "not interfere with the free flow of imported goods among the States, as did the exactions by States under the Articles of Confederation

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[44] *Id*. at 285–286.

[45] Brown v. Maryland, 25 U.S. 440, 441 (1827).

[46] *See Michelin Tire Corp.*, 423 U.S. at 299–300 (noting that although "the line of division is in some degree vague and indefinite," it could not be drawn "more in harmony with the obvious intention and object of this provision in the constitution").

[47] *Id*. at 286.

[48] *Id*. at 286-87.

directed solely at imported goods."[49] The Court thus concluded that the Georgia non-discriminatory property tax was "not the type of state exaction which the Framers of the Constitution or the Court in *Brown* had in mind as being an 'impost' or 'duty'" because the tax violated none of the Import-Export Clause's underlying purposes.[50]

Two years after the Supreme Court repudiated the original package doctrine for exports, the Supreme Court addressed the rule's counterpart, the export stream rule. In *Washington Department of Revenue v. Association of Washington Stevedoring Companies,* the Court held that "the *Michelin* approach should apply to taxation involving exports as well as imports."[51] The case involved the assessment of a state business and occupation tax to stevedoring, the process of loading and unloading cargo from ships.[52] The Court applied the approach adopted for imports in *Michelin* to stevedores, who load and unload both imports and exports.[53] However, in applying the *Michelin* approach to exports, the tax does not need to protect federal revenues, because the Constitution forbids any federal taxation of exports.[54] Therefore, a tax on exports satisfies the *Michelin* approach so long as it neither disrupts United States foreign policy nor creates friction among the states.[55] The *Washington Stevedoring* court concluded that the tax satisfied both prongs of the *Michelin* approach as applied to

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[49] *Id*. at 288.

[50] *Id*. at 283.

[51] See Dep't of Revenue v. Ass'n Wash. Stevedoring Cos., 435 U.S. 734, 758 (1978) (discussing the formal differences between the analyses for import and export cases but concluding that the *Michelin* approach should apply to the taxation of both).

[52] *See id*. at 736 (noting that "the State of Washington would apply its business and occupation tax to stevedoring").

[53] *See id.* at 758 (reasoning that despite the "formal differences [between imports and exports], the *Michelin* approach should apply to taxation involving exports as well as imports").

[54] The sole difference in applying the *Michelin* approach to exports is required by the separate constitutional provision. *See* U.S. CONST. art. I, § 9, cl. 5 ("No Tax or Duty shall be laid on Articles exported from any State . . . .").

[55] *See Ass'n Wash. Stevedoring Cos.*, 435 U.S. at 758 (stating that the export-tax ban of the Import-Export Clause "vindicates two of the three policies identified in *Michelin*").

exports.[56] However, the Supreme Court did not expressly overrule the export stream rule itself.[57]

C. THE *MICHELIN* RESERVATION

The 1946 *Richfield Oil* decision remains "an island of constitutional tax immunity"[58] yet-untouched by the rising tide of the Court's new approach begun in *Michelin*. In *Richfield Oil*, the Supreme Court invalidated a California gross receipts tax on the export of oil to the New Zealand government as a violation of the Import-Export Clause.[59] The Court applied the then-prevailing export stream rule, noting that delivery of oil into the vessel "marked the commencement of the movement of the oil abroad."[60] Therefore, the oil was an export and received absolute immunity from any taxation, even a non-discriminatory state tax.[61] In reaching its holding, the *Richfield Oil* Court did not examine whether the tax itself was one that the Import-Export Clause was designed to prevent but instead focused on the character of the good being taxed.[62] This analysis, which focused on the character of the good rather than the character of the tax, was the type of inquiry the *Michelin* Court rejected.[63]

Despite the conflict between the *Michelin* approach and the earlier Import-Export Clause jurisprudence applied in *Richfield Oil*, questions about the validity of state taxes on export goods in

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[56] *See id.* at 755 (holding that "the Washington tax is not a prohibited 'Impost or Duty' [because] it violates none of the policies").

[57] *See* Virginia Indonesia Co. v. Harris Cty. Appraisal Dist., 910 S.W.2d 905, 912 (Tex. 1995) (applying the export stream rule "[i]n light of the fact that the United States Supreme Court has not overruled *Coe v. Errol* or any of its progeny").

[58] Richfield Oil Corp. v. State Bd. Of Equalization, 329 U.S. 69, 87 (1946) (Black, J., dissenting).

[59] *See id.* at 86 ("We conclude that the tax which California has exacted from appellant is an impost upon an export within the meaning of Article I, Section 10, Clause 2, and is therefore unconstitutional.").

[60] *Id.* at 83.

[61] *See id.* at 76 (arguing that the Import-Export Clause "prohibits every State from laying 'any' tax on imports or exports").

[62] *See id.* at 76–78 (considering "whether we have here an export" instead of the question of whether the tax itself was an exaction that Import-Export Clause "was designed to prevent" because the intention of the provision was "only a phase of a larger design").

[63] *See* Limbach v. Hooven & Allison Co., 466 U.S. 353, 360 (1984) (stating that the focus was "the nature of the tax at issue" and not "the nature of the goods").

transit have lingered. When the *Michelin* Court finished outlining the purposes of the Import-Export Clause, it concluded that:

> Nothing in the history of the Import-Export Clause even remotely suggests that a nondiscriminatory ad valorem property tax which is also imposed on imported goods that are *no longer in import transit* was the type of exaction that was regarded as objectionable by the Framers of the Constitution.[64]

The Court, however, never provided any reasoning to support its reservation for goods that "are no longer in import transit . . . ."[65] Instead, the Court in *Washington Stevedoring*, over the dissent of Justice Powell, declined to clarify this point, opting to defer the decision.[66] Nonetheless, the Supreme Court itself has questioned whether *Richfield Oil* remains good law. In *Itel Containers International Corp. v. Huddleston*, the Court declined to apply *Richfield Oil*'s "in transit" approach "[e]ven assuming that rule has not been altered by the approach [the Court] adopted in *Michelin*."[67]

Due to the lingering doubts surrounding *Richfield Oil*'s continuing validity, lower courts have struggled to determine whether to apply the *Michelin* approach to state taxes on export goods in transit. Indeed, many courts have been skeptical of *Richfield Oil*, [68] such as an Alabama appellate court which upheld a

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[64] Michelin Tire Corp. v. Wages, 423 U.S. 276, 286 (1976) (emphasis added).

[65] *Id.*

[66] *See* 435 U.S. at 758 n.23 ("We do not reach the question of the applicability of the *Michelin* approach when a State directly taxes imports or exports in transit" until "a case with pertinent facts is presented" and "the issue with all its ramifications may be decided.").

[67] 507 U.S. 60, 77 (1993); *but see* United States v. Int'l Bus. Machs. Corp., 517 U.S. 843, 862 (1996) (stating in dicta that the Court had not overruled the core holding of *Richfield Oil* and had "never upheld a state tax assessed directly on goods in import or export transit").

[68] *See, e.g.*, Auto Cargo, Inc. v. Miami Dade Cty., 237 F.3d 1289, 1294 (11th Cir. 2001) (applying the *Michelin* approach to goods in export transit because "*Michelin* establishes the only applicable standard"); Duty Free Shoppers, Ltd. v. Tax Comm'r, 464 F. Supp. 730, 733–34 (D. Guam 1979) (applying the *Michelin* approach); Alaska Dep't of Revenue v. Alaska Pulp America, Inc., 674 P.2d 268, 280 (Ak. 1983) (upholding a tax covering exports under *Michelin* because it "merely requires the taxpayers to pay their just share for the privilege of conducting business"); Arizona Dep't of Revenue v. Robinson's Hardware, 721 P.2d 137, 139 (Ariz. 1986) (finding that "the rule enunciated in *Richfield* is no longer the proper standard by which to measure the validity of state taxation" and that the *Michelin* approach "is now the proper standard"); Holt Hauling & Warehousing System, Inc. v. Director, Div. of Taxation, 9 N.J. Tax 446 (1987) (applying "[t]he prevailing rule" from *Michelin* to goods in export

business-license tax on revenue from exported goods.[69] *Richfield Oil* was the cornerstone of the appellant's argument that the Import-Export Clause prohibited the tax.[70] The court noted that the authority the appellant relied on "to support its contentions are no longer valid" and applied the *Michelin* approach instead.[71] Other courts have been more hesitant to abandon *Richfield Oil* without a clear statement by the Supreme Court.[72] For instance, the Virginia Supreme Court determined that the "[r]esolution of the constitutional propriety of the BPOL tax to Duty Free's in-transit export sales hinges on the applicability, and ongoing validity, of the decision in *Richfield Oil*."[73] The court then invalidated the tax because, although *Michelin* "significantly revised [the Supreme Court's] Import-Export Clause jurisprudence," *Richfield Oil* has not been overruled and "the Court has carefully carved out for future disposition the issue whether the *Michelin* test would apply to a non-discriminatory tax that falls on export goods in transit."[74] This open question of constitutional law has divided the federal courts of appeals and state courts of last resort, leading to inconsistent results.[75] Lower court judges seek clarification on the issue from the United States Supreme Court.[76]

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transit); U.S. Steel Mining Co., LLC v. Helton, 631 S.E.2d 559, 564 (W. Va. 2005) (holding that *Michelin* has "fully supplanted the more mechanistic 'in export transit' approach of earlier cases like *Richfield Oil*").

[69] *See* P.J. Lumber Co. v. City of Prichard, 249 So. 3d 1135, 1135 (2017) (upholding the tax on exports under the *Michelin* analysis).

[70] See *id.* at 1139 (noting that P.J. Lumber's argument cites to "a number of cases decided before 1976, when in *Michelin* . . . the United States Supreme Court 'initiated a different approach to Import-Export Clause cases'").

[71] *Id.*

[72] *See, e.g.*, Louisiana Land & Expl. Co. v. Pilot Petroleum Corp., 900 F.2d 816, 816 (5th Cir. 1990) (striking down a tax on goods in export transit under the Import-Export Clause, using reasoning of both *Michelin* and *Richfield Oil*); Connell Rice & Sugar Co., Inc. v. Cty. of Yolo, 569 F.2d 514, 518 (9th Cir. 1978) (citing *Richfield Oil* as "helpful authorit[y]"); Ammex, Inc. v. Dep't of Treasury, 603 N.W.2d 308, 313 (Mich. Ct. App. 1999) (applying *Richfield Oil* because it has "never been expressly overruled"); Virginia Indonesia Co. v. Harris Cty. Appraisal Dist., 910 S.W.2d, 905 911 (Tex. 1995) (holding that "*Michelin* appears to preserve bright-line immunity for goods in the stream of export" but that this issue "remains uncertain" until the Supreme Court addresses it).

[73] Dulles Duty Free, LLC v. County of Loudoun, 803 S.E.2d 54, 57 (Va. 2017).

[74] *Id.* at 61.

[75] *Compare supra* note 68 *with supra* note 72.

[76] *U.S. Steel Mining Co., LLC*, 631 S.E.2d 559, 580 (W. Va. 2005) (Benjamin, J., dissenting) (hoping "that the United States Supreme Court would take the opportunity to bring a new clarity to this area of constitutional law in the near future").

III. ANALYSIS

Richfield Oil is inconsistent with the text and intent of the Import-Export Clause. Because the *Michelin* approach embodies the Framers' intentions for the Import-Export Clause, it should be applied uniformly to both imports and exports. Post-*Michelin* courts that apply *Richfield Oil* to state taxes on export goods in transit have done so not because the Import-Export Clause demands it but solely on the basis that the Supreme Court has not yet explicitly overruled *Richfield Oil*.[77] However, inconsistent precedent cannot alter the meaning of a constitutional provision.[78] In determining the meaning of the Import-Export Clause and its proper application, it is necessary to examine the language of the provision at issue.[79] The language actually adopted elucidates the Framers' intentions, and thus the *Michelin* analysis is in line with both the text and the purpose of the Import-Export Clause.[80]

A. THE TEXT OF THE IMPORT-EXPORT CLAUSE

1. The Import-Export Clause Applies Uniformly to Imports and Exports

The text of the Import-Export Clause evinces no rationale by which imports and exports should be treated differently. The provision contains the term "exports" only in conjunction with "imports,"[81] which necessarily demonstrates that all prohibitions on

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[77] *See, e.g.*, *Virginia Indonesia Co.*, 910 S.W. 2d at 905 (applying *Richfield Oil*'s bright-line immunity for goods in the stream of export because it has not been explicitly overruled).

[78] *See* William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736 (1949) ("[I]t is the Constitution which [a judge] swore to support and defend, not the gloss which his predecessors may have put on it."); Michael Stokes Paulsen, *Captain James T. Kirk and the Enterprise of Constitutional Interpretation: Some Modest Proposals–From the Twenty-Third Century*, 59 ALB. L. REV. 671, 680 (1995) (arguing that it is itself unconstitutional for courts "to give greater legal force to its own prior decisions than to the Constitution").

[79] *See* Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO L.J. 1113, 1128 (2003) (arguing that the Constitution itself "appears to prescribe textualism (in some form or another) as the proper mode of interpretation and application of the Constitution").

[80] *See* Martin H. Redish & Karen L. Drizin, *Constitutional Federalism and Judicial Review: The Role of Textual Analysis*, 62 N.Y.U. L. REV. 1, 19 (1987) (reasoning that "the language actually adopted is the best evidence of what the drafters intended").

[81] *See* U.S. CONST. art. I, §10, cl. 2 ("No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary

the power of states to tax imports should apply with equal force to exports. Indeed, it is nearly inconceivable to read the Import-Export Clause as implicitly requiring the application of a more stringent test for exports than for imports in light of the fact that the Framers elsewhere explicitly provided for different treatment between imports and exports.[82] Unlike the Export Clause, the Import-Export Clause does not single out exports for a more exacting form of scrutiny than imports.

The Supreme Court has already dismissed the notion that imports and exports should be treated differently. The *Washington Stevedoring* Court, which first applied the *Michelin* approach to exports, noted that pre-*Michelin* cases adopted separate tests for imports and exports.[83] These separate tests were necessary inquiries to determine whether a good was, in fact, an import or export.[84] After *Michelin*, however, the inquiry is no longer about "the nature of the goods" but is instead about "the nature of the tax at issue."[85] Therefore, the *Washington Stevedoring* Court concluded that "the *Michelin* approach should apply to taxation involving exports as well as imports," despite any formal differences between exports and imports themselves.[86] The extent to which *Washington Stevedoring* adopts a different approach for exports and imports is driven only by the text of the Constitution because the Export Clause prohibits the Federal Government from using exports as a source of revenue entirely.[87]

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for executing its inspection Laws; and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury . . . .").

[82] *See* U.S. CONST. art. I, § 9, cl. 5 (prohibiting any federal taxes or duties on "[a]rticles exported from any State" with no mention of imports).

[83] *See* Dep't of Revenue v. Ass'n of Wash. Stevedoring Cos., 435 U.S. 734, 758 (1978) (noting that "the analysis in the export cases had differed from that in the import cases").

[84] *See id*. at 760 (stating that "what constitutes an import or export" was once "the exclusive consideration" in applying the Import-Export Clause).

[85] See Limbach v. Hooven & Allison Co., 466 U.S. 353, 360 (1984) ("*Michelin* changed the focus of Import-Export Clause cases from the nature of the goods as imports to the nature of the tax at issue.").).

[86] *Ass'n of Wash. Stevedoring Co.*, 435 U.S. at 758.

[87] *See id*. (noting that the second prong of the *Michelin* approach—whether the tax at issue diverts revenue from the government—is not a concern when analyzing a tax that falls on exports "because the Constitution forbids federal taxation of exports").

2. The Import-Export Clause Focuses on the Nature of the Tax, Not the Goods

The central holding of *Michelin* was that courts must no longer focus on whether the *goods* at issue are imports or exports but instead whether the *taxes* at issue are "Imposts or Duties."[88] This holding was based on the text of the Constitution, which necessarily implied that the Import-Export Clause did not prohibit every type of tax, but only those taxes which could be characterized as "Imposts or Duties."[89] In 1787, these terms had specific meanings that did not encompass every non-discriminatory tax that fell on imports or exports. Instead, "imposts" generally indicated "custom duties," which were taxes "collected on imports and exports, at the time and place of importation or exportation, respectively."[90] "Duties" were construed more broadly as including most exactions except property taxes.[91] The common characteristic of both imposts and duties was that they were directed at imports and exports *as such*.[92] The *Michelin* Court, after detailing the early usage of these terms, concluded that the language of the Import-Export Clause is ambiguous enough that "Imposts or Duties" embraces only taxation which offends the underlying policies of the Import-Export Clause.[93] The *Michelin* Court defined imposts and duties as mere transit

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[88] *See id.* at 759 (stating that *Richfield Oil* "ignores the central holding of *Michelin* that the absolute ban is only of 'Imposts or Duties' and not of all taxes").

[89] *See* Michelin Tire Corp. v. Wages, 423 U.S. 276, 290 (1976) (explaining that the Import-Export Clause plainly does not "prohibit[] every exaction or 'tax' which falls in some measure on imported goods" because "Congress is empowered to 'lay and collect Taxes, Duties, Imposts, and Excises'" under Article I, Section 8 of the United States Constitution).

[90] See 1 W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 296 (1953) (explaining the original meaning of imposts).

[91] *See id.* (defining "duties" as including nearly all taxes except "[p]oll, or capitation taxes; land taxes; and general property taxes"). *But see Ass'n of Wash. Stevedoring Cos.*, 435 U.S. at 760 n.26 (criticizing Crosskey's definition of "duties" as encompassing excises because "[h]e does not explain . . . why Art. I, § 8, cl. 1, enumerated 'Taxes, Duties, Imposts and Excises' if the Framers intended duties to include excises").

[92] *See Michelin*, 423 U.S. at 292 (asserting that the "characteristic common to both 'imposts' and 'duties' was that they were exactions directed at imports and commercial activity as such").

[93] *See id.* at 293–94 (declining to presume the Import-Export Clause "was intended to embrace taxation that does not create the evils the Clause was specifically intended to eliminate" because "[t]he terminology employed in the Clause—'Imposts or Duties'—is sufficiently ambiguous").

fees.[94] Therefore, the determination of which taxes are prohibited as "Imposts or Duties" requires the application of the *Michelin* policy-based approach.

3. There is No Textual Support for the "In Transit" Distinction

The original reservation in *Michelin* has no basis in the text of the Import-Export Clause. In deciding that the Georgia tax was not the type of tax prohibited by the Import-Export Clause, the *Michelin* Court asserted that "[n]othing in the history of the Import-Export Clause even remotely suggests that a nondiscriminatory ad valorem property tax which is also imposed on imported goods that are *no longer in import transit* was the type of exaction that was regarded as objectionable by the Framers of the Constitution."[95] As an explanation for the "in transit" reservation, the Court noted that a non-discriminatory ad valorem property tax was different from a mere transit fee but that "to the extent there is any conflict whatsoever with this purpose of the Clause, it may be secured merely by prohibiting the assessment of even nondiscriminatory property taxes on goods which are merely in transit through the State when the tax is assessed."[96] The questionable status of *Richfield Oil* can be traced back to this arbitrary distinction, which has been criticized as standing in contrast to the otherwise well-reasoned *Michelin* opinion.[97]

The "in transit" distinction appears nowhere in the text of the Import-Export Clause. To the extent that the *Michelin* Court indicates that such a distinction is mandated by the underlying purposes of the Import-Export Clause, it does so with the phrase "whatsoever," which implies that a non-discriminatory tax would

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[94] *See id*. at 287 (stating that imposts and duties were "essentially taxes on the commercial privilege of bringing goods into a country").

[95] *Id*. at 286 (emphasis added). However, the "in import transit" distinction is no longer a consideration when evaluating the constitutionality of state taxes on import goods. The "in transit" reservation has only survived as applied to exports.

[96] *Id*. at 290.

[97] *See, e.g.*, Hellerstein, *supra* note 1, at 113 (calling *Michelin* "an uncertain guide" because the *Michelin* Court's "terse treatment" of the in transit issue stood in stark contrast with "its leisurely and discursive exploration of the historical issues raised").

not necessarily be in conflict with the purposes of the Import-Export Clause and that such a conflict is only a possibility.[98]

That the non-textual "in transit" reservation in *Michelin* was not intended to serve as a bright-line rule of constitutional tax immunity is made clear when reading the reservation in its context.[99] This is because the paragraph in which the "in transit" reservation appears distinguishes taxation which "do[es] not interfere with the free flow of imported goods among the States" and "is the quid pro quo for benefits actually conferred by the taxing State" from "the exactions by States under the Articles of Confederation directed solely at imported goods."[100] The Import-Export Clause was intended to exempt taxes that were merely transit fees, which necessarily interfere with the flow of imports and exports and are not truly quid pro quo for state services.[101] While a tax on export or import goods in transit may be more likely to offend the purposes of the Import-Export Clause, such a bright-line rule is not required by the Import-Export Clause.

The text of the Import-Export Clause plainly demonstrates that there is no justification to retain the *Richfield Oil* rule. While the Import-Export Clause makes no effort to distinguish between the level of protection from state taxes afforded to exports as opposed to imports, *Richfield Oil* treats exports and imports differently by adding a bright-line rule of invalidity only on exports.[102] Moreover, *Richfield Oil* ignores the original meaning of "Imposts or Duties" by focusing on the nature of the goods being taxed rather than the nature of the tax itself. This conflates the specificity of "Imposts or Duties" with all forms of taxation. The reservation for "in transit" goods has no basis in the Import-Export Clause itself and should not be understood as creating a bright-line rule of constitutional tax

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[98] *See* Va. Indon. Co. v. Harris Cty. Appraisal Dist., 910 S.W.2d 905, 919 (Tex. 1995) (Hecht, J. dissenting) (arguing that the "use of the word 'whatsoever' suggests, if anything, that such conflict in any event is minimal").

[99] *See id*. (observing that "the context in which the passage appears makes it doubtful that the Supreme Court contemplated any prohibition against nondiscriminatory ad valorem taxes on imports and exports in transit except in very limited circumstances, let alone an absolute prohibition").

[100] *Michelin Tire Corp.*, 423 U.S. at 287–89.

[101] *See Va. Indon. Co.*, 910 S.W.2d at 919 (Hecht, J. dissenting) (concluding that "[t]he Import-Export Clause was intended to prohibit exaction of fees for nothing more than the privilege of moving through a state's ports").

[102] Richfield Oil Corp. v. State Bd. of Equalization, 329 U.S. 69, 85–86 (1946).

immunity. Unlike the *Richfield Oil* rule, the policy-based approach adopted in *Michelin* is consistent with the text of the Import-Export Clause and should therefore apply equally to export goods in transit as it does import goods in transit.

B. THE INTENT OF THE IMPORT-EXPORT CLAUSE

In *Michelin*, the Court clearly signaled its departure from the old, mechanistic approaches to the Import-Export Clause.[103] In its place, the *Michelin* court developed a policy-based approach that is in harmony with the three main concerns of the Framers in including the Import-Export Clause.[104] Because the text of the Import-Export Clause is sufficiently ambiguous, courts ought to consider the intentions of the Framers of the Constitution.[105]

1. Richfield Oil *Risks Distorting the Framers' Intent*

The bright-line immunity for export goods in transit preserved in *Richfield Oil* may be a shorthand attempt to conform to the intentions underlying the Import-Export Clause but is less precise than the *Michelin* approach. As identified by the *Michelin* Court, the Import-Export Clause was intended to allow the Federal Government to speak with one voice, protect imports as a source of federal revenue, and ensure harmony between the states.[106] A tax allowed by *Richfield Oil*'s in transit rule is less likely to offend these intentions, while a tax prohibited by *Richfield Oil* probably does offend them.[107] Conversely, the *Michelin* approach produces results coextensive with constitutional policy because it considers the underlying policies directly. To apply the *Richfield Oil* per se rule of

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[103] *See* U.S. Steel Mining Co. v. Helton, 631 S.E.2d 559, 564 (2005) (rejecting the argument that "the *Michelin* policy-based analysis has not fully supplanted the more mechanistic 'in export transit' approach of earlier cases like *Richfield Oil*").

[104] 423 U.S. at 283 (developing an approach based on the "type[s] of state exaction which the Framers of the Constitution . . . had in mind as being an 'impost' or 'duty'").

[105] *See Michelin Tire Co.*, 423 U.S. at 293–94 (upholding the Georgia tax under the Import-Export Clause because "only the clearest constitutional mandate should lead us to condemn such taxation" when "[t]he terminology employed in the Clause 'Imposts or Duties' is sufficiently ambiguous").

[106] *See* 423 U.S. at 285–86 (listing underlying purposes of the Import-Export Clause).

[107] *See* Va. Indon. Co. v. Harris Cty. Appraisal Dist., 910 S.W.2d 905, 919 (Tex. 1995) (Hecht, J., dissenting) (arguing that while the "in-transit rule is a good rule of thumb," it is "neither a deduction from nor a restatement of the policies embodied in the constitutional provision").

tax immunity to invalidate a tax that would otherwise be upheld under the *Michelin* approach would lead to an illogical result: a tax that does not offend the policies of the Import-Export Clause but is nevertheless prohibited.[108] While the factual issue of whether a good remains in transit may be considered under the *Michelin* approach, it is not treated as dispositive.[109] In contrast, the *Richfield Oil* test, which considers this lone, isolated fact as a stand-in for a purposive inquiry, risks distorting the Import-Export Clause. Using *Richfield Oil* to prohibit state taxation otherwise allowed by *Michelin* "would not further the objectives of the Import-Export Clause."[110]

2. Richfield Oil *Risks Subsidizing Exporters at the Expense of Local Taxpayers*

The Import-Export Clause was not intended to prohibit state taxation if it is simply the quid pro quo for the benefits conferred by the taxing state. [111] As the *Michelin* Court noted, the Import-Export Clause was included in the Constitution to prohibit those taxes which were merely transit fees, which is not the same as taxes on goods in transit.[112] If a state has conferred actual benefits such as police and fire protection to export goods while they are in transit, the state should be able to tax the exporter in exchange.[113] A rule that provides absolute constitutional tax immunity to export goods both undermines federalism and risks allowing exporters to avoid

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[108] *See id*. at 921 ("For there to be an exception to the *Michelin* rule, there must be some tax that was fully consistent with constitutional policies but nevertheless prohibited, or a tax that was inconsistent with such policies and yet permitted. Neither is possible.").

[109] *See id*. at 916 ("Whether property is in transit, and more importantly, *how* it is in transit, remains a relevant factor in assessing the validity of a tax, but it is not the only factor.").

[110] *Michelin Tire Corp.*, 423 U.S. at 293.

[111] *Joy Oil Co. v. State Tax Comm'n*, 337 U.S. 286, 288 (1949) (stating that the Import-Export Clause was not intended "to relieve property eventually to be exported from its share of the cost of local services").

[112] *See Michelin Tire Corp.*, 423 U.S. at 290 ("In effect, the Clause was fashioned to prevent the imposition of exactions which were no more than transit fees on the privilege of moving through a State.").

[113] *See* Xerox Corp. v. Harris County, 459 U.S. 145, 158 (1982) (Powell, J., dissenting) (arguing that the tax at issue should be upheld because the "goods benefited from police and fire protection and the various other services provided by the County and City," the non-discriminatory tax "'simply ma[de] the imported goods pay their own way, as opposed to exactly a fee merely for the privilege of moving through a State'") (quoting Dep't of Revenue v. Ass'n of Wash. Stevedoring Cos., 435 U.S. 734, 764 (1978) (Powell, J., concurring in part and concurring in the result) (internal quotations omitted)).

paying taxes for the state benefits they receive. This would also increasingly burden coastal states.[114] Just as there is no reason for local taxpayers to subsidize importers, there is no reason the Constitution should demand that local taxpayers subsidize exporters.[115]

The *Richfield Oil* in transit rule provides just this type of subsidy to exporters and foreign consumers by exempting exporters from paying taxes for the state benefits they actually receive. Justice Black, dissenting in *Richfield Oil*, declined to endorse a rule that would "result[] in creating an island of constitutional tax immunity for a substantial proportion of the profitable businesses of the nation" on the grounds that "the history and the evolution of the constitutional prohibition against taxation of exports manifest that there was no intention to subsidize either export businesses or foreign purchasers by any such broad immunity from state and federal taxation."[116] Black argued that the tax at issue in *Richfield Oil* "and its economic consequences plainly are not those which the writers of the Constitution condemned."[117] Under *Richfield Oil*, a producer of goods stored on a ship or airplane destined to foreign consumers would be immune to even non-discriminatory state taxation while a producer selling the very same type of goods in-state or to another state would be subject to those same taxes.[118] Not

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[114] *See* Louisiana Land and Expl. Co. v. Pilot Petroleum Co., 900 F.2d 816, 822 (1990) (Jolly, J., dissenting) (observing that "it is only coastal states that bear the regulatory, administrative, and increasingly, environmental, costs of [maritime] commerce").

[115] *See Michelin Tire Corp.*, 423 U.S. at 289 ("There is no reason why local taxpayers should subsidize the services used by the importer; ultimate consumers should pay for such services as police and fire protection accorded the goods just as much as they should pay transportation costs associated with those goods."); *see also* Va. Indon. Co. v. Harris Cty. Appraisal Dist., 910 S.W.2d 905, 919 (Tex. 1995) (Hecht, J. dissenting) ("The Clause was not intended to exempt imports and exports from their fair share of the cost of police and fire protection and other such services rendered by the state through which goods pass."); *Louisiana Land and Expl. Co.*, 900 F.2d at 822 (Jolly, J., dissenting) ("The Framers did not intend [coastal] states to bear all these costs" of exporting goods.).

[116] Richfield Oil Corp. v. State Bd. of Equalization, 329 U.S. 69, 87, 89 (1946) (Black, J., dissenting).

[117] *Id.* at 89.

[118] The Civil War era decision in *Woodruff v. Parkham*, 8 Wall. 123 (1869) held that the Import-Export Clause applied only to foreign trade and not trade between states. While not overturned, this decision has been criticized in light of the *Michelin* revolution. *See, e.g.*, Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 634 (1997) (Thomas, J., dissenting) (criticizing the *Woodruff* Court's "weak textual analysis" and arguing that it "no longer has any force" after *Michelin*); Bittker & Denning, *supra* note 7, at 541 (arguing that

only does the retention of the *Richfield Oil* rule discriminate among the producers, but it ultimately subsidizes foreign consumers over domestic consumers.[119] The *Michelin* Court rejected the idea that some goods should receive "preferential treatment that permits escape from uniform taxes imposed without regard to foreign origin for services which the State supplies."[120] Just as the Framers did not intend to give preferential treatment to the purchase of foreign goods with a prohibition on non-discriminatory import taxes,[121] neither did they intend to discourage American consumers from buying American products by subsidizing domestic producers only when their products are shipped abroad.

3. Richfield Oil *Prohibits Otherwise Valid, Non-Discriminatory Taxation*

The historical background leading to the inclusion of the Import-Export Clause demonstrates that the Framers intended to prevent discriminatory taxation by the states.[122] Even *Richfield Oil* concedes that "the history of the Import-Export Clause shows that it was designed to preclude the levy of general taxes applicable alike

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the "veritable lexicon of late eighteenth century legal and business terminology" that the *Michelin* Court relied on in its decision leads to the conclusion that "one would have to reject *Woodruff v. Parham*, and apply the Import-Export Clause to interstate as well as foreign commerce").

[119] This is similar to the dissent's example of tax disadvantages for domestic wine sellers in *Hooven & Allison Co. v. Evatt*, 324 U.S. 652, 690–91 (1945) (Black, J., dissenting). Justice Black argued that "[t]he whole history of events leading up to the Constitution" does not sugget that "the Constitution required such tax discriminations against American products . . . ." *Id.* at 690. After *Michelin*, this reasoning was vindicated when the majority's rule in *Evatt* was overruled by *Limbach v. Hooven & Allison Co.*, 466 U.S. 353 (1984). Likewise, there is no indication that the Constitution requires such tax discriminations against American consumers.

[120] *Michelin Tire Corp*., 423 U.S. at 287 (citation omitted).

[121] *See id.* (noting that the prevention of incidental burdens on imports was not "even remotely an objective of the Framers in enacting the prohibition"); *see also* Bradford Exch. A.G. v. Illinois Dep't of Revenue, 508 N.E.2d 316, 321 (Ill. App. Ct. 1987) (arguing that under *Michelin*, taxpayers should not "receive preferential treatment by being allowed to escape from State taxes imposed uniformly and without discrimination upon all persons doing business in the State").

[122] *See Michelin Tire Corp*., 423 U.S. at 282–83 (concluding that non-discriminatory ad valorem property taxes were not prohibited by the Import-Export Clause because it could be plainly "inferred from consideration of the specific abuses which led the Framers to include the Import-Export Clause in the Constitution").

to all goods."[123] Therefore, whether a state tax is imposed uniformly and without discrimination upon all persons doing business in the state should be a threshold question in determining whether such tax falls within the prohibition of the Import-Export Clause.[124] Furthermore, the emphasis on whether a tax is non-discriminatory comports perfectly with the *Michelin* approach.[125] In explaining its policy-based approach, the *Michelin* Court emphasized the non-discriminatory nature of taxes that did not offend the underlying policies of the Import-Export Clause.[126] First, the Court noted that non-discriminatory taxes, which by definition do not fall on goods "because of their place of origin," can obviously have "no impact whatsoever on the Federal Government's exclusive regulation of foreign commerce."[127] Likewise, the Court concluded that non-discriminatory taxes "do not interfere with the free flow of imported goods among the States" because unlike "the exactions by States under the Articles of Confederation," non-discriminatory taxes were not "directed solely at imported goods."[128] Therefore, in most cases, a state tax on export goods in transit would not violate the policies

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[123] *See* Richfield Oil Corp. v. State Bd. of Equalization, 329 U.S. 69, 76 (1946) (concluding that this proposition was supported by the Constitutional Convention, the debates, and the Federalist Papers). *Richfield Oil* claimed that this "function was only a phase of a larger design" because the purpose was "to deprive any State of the power [to tax imports or exports] except with the consent of Congress." *Id*. at 76–77. However, *Michelin* held that the Import-Export Clause did not enact an absolute prohibition on any state taxation of imports or exports. *Michelin Tire Corp.*, 423 U.S. at 293–94 ("The terminology employed in the [Import-Export] Clause . . . is sufficiently ambiguous that we must decline to presume it was intended to embrace taxation that does not create the evils the [Import-Export] Clause was specifically intended to eliminate."). Therefore, *Richfield Oil*'s distinction of the history of the Import-Export Clause with the "larger design" is a nullity.

[124] *See* Early & Weitzman, *supra* note 34, at 250 (arguing that "[t]he differentiation between discriminatory and nondiscriminatory taxation by the states should be considered a threshold issue" and that if the tax is non-discriminatory, then "the tax should be allowed since it is not within the scope of the [I]mport-[E]xport [C]lause").

[125] *See Michelin Tire Corp*., 423 U.S. at 286 (distinguishing "discriminatory state taxation against imported goods as imports" from an exaction that was "not regarded as an impediment that severely hampered commerce or constituted a form of tribute by seaboard States to the disadvantage of the other States").

[126] *Id.*

[127] *Id.*; *see also* Bradford Exch. A.G. v. Ill. Dep't of Revenue, 508 N.E.2d 316, 321 (Ill. App. Ct. 1987) (concluding that the tax did not infringe on "the Federal [G]overnment's need to deal uniformly with foreign nations" when "the tax is a nondiscriminatory exaction applied without regard to the origin of the goods" because "there is no danger that imports will be selectively taxed based upon their foreign origin or that States will be able to apply the tax in a manner which would create a protective tariff").

[128] *Michelin Tire Corp.*. 423 U.S. at 288.

set forth in *Michelin* if it is imposed uniformly, without discrimination, and is not merely a transit fee.

While the bright-line immunity for export goods in transit provided by *Richfield Oil* is a shorthand attempt to comply with the underlying purposes of the Import-Export Clause, it is a poor substitute for the *Michelin* approach. Because any tax upheld under the *Michelin* approach would be consistent with the underlying purposes of the Import-Export Clause, the retention of *Richfield Oil* as an exception to *Michelin* suggests the illogical result that there may be a state tax that would be upheld under *Michelin* as consistent with the purposes of the Import-Export Clause yet nonetheless struck down under *Richfield Oil*. The *Richfield Oil* in transit rule risks prohibiting state taxation that is the quid pro quo for benefits the state confers. The result from the *Richfield Oil* rule is inconsistent with the Import-Export Clause, which was intended neither to force local taxpayers to subsidize exporters and foreign consumers nor to unfairly burden coastal states with the regulatory, administrative, and environmental costs of shipping exports. The prohibition imposed by *Richfield Oil* also fails to distinguish between discriminatory and non-discriminatory taxation, which is important in determining whether a state tax violates the underlying purposes of the Import-Export Clause. Because the *Michelin* approach is precisely tailored to address the concerns that motivated the Framers to include the Import-Export Clause, courts should not apply the *Richfield Oil* exception to the *Michelin* approach to invalidate state taxes that violate no constitutional objectives.

IV. CONCLUSION

After decades of economic rivalries between the states, the Framers included the Import-Export Clause in the Constitution to serve three purposes: to empower the new Federal Government to speak with one voice, to protect import revenues from diversion to the states, and to promote harmony between the states. Early Import-Export Clause decisions focused on the nature of the goods being taxed, holding that all imports and exports enjoyed absolute immunity from state taxation.

Michelin changed this analysis by recognizing that the Import-Export Clause did not serve as an absolute prohibition on all exactions but only those taxes characterized as imposts or duties.[129] This shifted the analysis from a focus on the nature of the goods to the nature of the tax. Under the *Michelin* approach, the underlying constitutional policies and the scope of the Import-Export Clause's prohibition are coextensive. However, *Michelin* and later decisions declined to reach the question of export goods in transit, allowing the bright-line rule in *Richfield Oil* to linger as the lone exception to *Michelin*'s general rule.[130]

The text of the Import-Export Clause demonstrates that the *Richfield Oil* exception must be overturned. While the Clause is written to apply with equal force to imports and exports, *Richfield Oil* establishes a zone of absolute constitutional tax immunity only for export goods in transit. Moreover, *Richfield Oil* prohibits *all* taxes on export goods in transit while the Import-Export Clause, in contrast to other constitutional provisions on taxation, prohibits *only* imposts and duties.

Richfield Oil also contorts the constitutional policies underlying the Import-Export Clause. Because the policies of the *Michelin* approach and the purposes leading to the inclusion of the Import-Export Clause are coextensive, any tax upheld under *Michelin* could not violate the Import-Export Clause as intended by the Framers. To allow *Richfield Oil* to strike down such a tax would result in unconstitutional taxes that nonetheless conform with the policies of the Constitution. Additionally, the *Michelin* approach distinguishes between taxes that are the quid pro quo for benefits conferred by the taxing state and taxes that are merely transit fees. *Richfield Oil* does not consider this fact, resulting in subsidizing exporters and foreign consumers at the expense of local taxpayers. The *Richfield Oil* in transit rule also disregards the central distinction made in *Michelin* and its progeny between discriminatory and non-discriminatory taxation.

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[129] *See id.* at 293–94 (declining to condemn a non-discriminatory tax because the terminology of "imposts or duties" embraces only taxation that "create[s] the evils the [Import-Export] Clause was specifically intended to eliminate").

[130] *See* Dep't of Revenue v. Ass'n of Wash. Stevedoring Cos., 435 U.S. 735, 757 n.23 (1978) (deferring decision on "the question of the applicability of the *Michelin* approach when a State directly taxes imports or exports in transit").

Because *Richfield Oil* is an anachronism in the wake of the *Michelin* approach and cannot be supported by either the text or underlying policies of the Import-Export Clause, courts should decline to apply its bright-line rule of constitutional tax immunity to export goods in transit. The *Michelin* approach, based in both the text and policies of the Import-Export Clause, should be applied equally to both imports and exports in determining the constitutionality of state taxes.